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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 781

C. R. TOWNSEND AND PARK BERNARD, A PARTNERSHIP KNOWN AS TOWNSEND & BERNARD, DOING BUSINESS AS COOK COUNTY WAREHOUSE, ET AL.,

Appellant,

versus

M. J. YEOMANS, ATTORNEY GENERAL FOR THE STATE OF GEORGIA, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA.

STATEMENT AS TO JURISDICTION.

J. O. GIBSON,
E. K. WILCOX,
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BENNETT & BENNETT,
ALSTON, ALSTON, FOSTER & MOISE,
Of Counsel.

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Appellant,

versus

M. J. YEOMANS, ATTORNEY GENERAL FOR THE STATE OF GEORGIA, ET AL.,

Appellees.

STATEMENT BY APPELLANTS OF THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW UPON APPEAL THE ABOVE-ENTITLED CAUSE.

(a) The Statutory Provisions Sustaining the Jurisdiction.

Appellants rely upon Section 238 of the Judicial Code, as amended by the Act of Congress of February 13, 1925 (Chapter 229, 43 Stat. 938, 28 U. S. C. A. 345), and also Section 266 of the Judicial Code, as amended by Act of Congress of February 13, 1925 (Chapter 229, 43 Stat. 938, 28

U. S. C. A. 380), as sustaining the jurisdiction of the Supreme Court of the United States to review the above entitled cause upon appeal.

(b) **The Decree Sought to be Reviewed.**

The decree appealed from is dated November 27, 1936, entered and filed of record November 27, 1936. The petition for appeal is presented December 12, 1936.

(c) **Nature of the Case and of the Rulings of the Court.**

The original bill in this cause was filed for the purpose of enjoining State officers in the enforcement of, and to set aside and annul a statute of the State of Georgia passed by the General Assembly of that State on March 28, 1935, which statute, among other things, fixed the maximum charges that tobacco warehousemen operating in the State of Georgia might charge for their services and facilities and fixed a scale of such maximum charges, as more fully appears in said statute. Copy of the statute is hereto attached as Appendix A.

The bill was filed for the purpose of attacking and setting aside said statute on the grounds that it violated the provisions of the Constitution of the United States, particularly the due process clause of the Fourteenth Amendment to the Constitution and the commerce clause, Article I, Section 8, Paragraph 3 thereof.

The bill was filed July 25, 1935, by complainants as warehousemen affected by the statute and as operators who owned or rented tobacco warehouses in the State of Georgia and who carried on the business of tobacco warehousemen, as defined in the statute in said State, during the 1935 selling season. By amendment those who operated for the 1936 season were joined as complainants. The respondents named were the law enforcing officers of the State of Georgia, being the Attorney General for Georgia, all Solicitors

of the City Courts, Solicitors General of the Judicial Circuits, and Sheriffs of the various counties in which warehouses of complainants were located. Some of the officials were also named respondents as individuals who grew tobacco and were members of the class of growers.

All respondents appeared and filed defensive pleadings.

The record shows that tobacco culture was a recent undertaking in the State of Georgia, barely now out of the experimental stage; that the only type grown was bright leaf, flue cured tobacco and it was used only in cigarette manufacture. The evidence showed without contradiction that no manufactory using this tobacco was operated in the State of Georgia and all tobacco grown there was transported in interstate and foreign commerce. The movement in such commerce begins so soon as the grower places his tobacco on the warehouse floor for sale. The appellants operate these warehouses not as storage places but as market places. Each must have a corps of employees, including auctioneers, bookkeepers, clip-men, book-men, and other skilled and unskilled help. Appellants, in most instances, and most of their skilled help, are non-residents, coming from the regions where growth, culture and marketing of tobacco has long been practiced.

Wherever there are located tobacco warehouses the tobacco manufacturers send their "buyers." A "set" is from eight to twelve buyers, representing the large cigarette manufacturers, such as American Tobacco Company, Liggett & Meyers, R. J. Reynolds, China American and British American, etc. None of the cigarette manufacturers have factories in the State of Georgia.

When the "cured" tobacco is brought to a warehouse by the grower and for the purpose of selling his tobacco, it is displayed in rows and a sale is held each day of the season (in Georgia generally the month of August) except on Satur-

days and Sundays. The warehousemen, appellants here, always make the initial bid as each basket is offered for sale. They compete with the buyers from the cigarette manufactories until competition between the buyers has brought a price they think is fair to the grower. The warehouseman who secures the best prices for the grower's tobacco normally gets the most business.

The warehouseman owns or rents buildings of large area in the various market towns, his corps of assistants and skilled employees, including auctioneers, are hired for the season, be it one week or six weeks, and paid by the warehouseman. He must pay the grower immediately the sale is confirmed by the grower and await collections from the purchasers. Large sums of money are, therefore, required to carry on this business.

The scale of pay to the warehouseman has three elements:

(1) A weighing or warehouse charge;
(2) An auction fee;
(3) A commission on the gross amount of the sale.

The scale generally charged in 1934 was:

Auction fees—Twenty-five cents per pile up to and including 200 pounds; fifty cents per pile above 200 pounds;

Warehouse (weighing) fees—Twenty-five cents per pile up to 100 pounds; twenty-five cents for each additional 100 pounds;

Commissions—2½% on the gross sales measured in dollars.

By Act of the Georgia Legislature of March 28, 1935, here under attack, the scale is as follows:

"For auction fees fifteen cents on all piles on one hundred pounds or less and twenty-five cents on all piles over one hundred pounds;

"For weighing and handling ten cents per pile of all piles of one hundred pounds and ten cents for each additional one hundred pounds;

"For commission on the gross sales of leaf tobacco in said warehouses not to exceed two and one-half per cent (2½%) of said gross sales."

The appellants brought their bill alleging that the aforesaid statute violated their constitutional rights guaranteed by the Constitution of the United States in that regulation of their business to the extent of price-fixing was unreasonable, arbitrary and capricious, destroyed their right of contract, deprived them of their property without due process of law, and that the power to so regulate, if it existed, reposed in the Congress of the United States and not the Legislature of Georgia by reason of the fact that this business as carried on is intercourse in interstate and foreign commerce and is an instrumentality of interstate and foreign commerce and the statute imposes an unlawful burden on such commerce.

Temporary injunction was granted on condition that the appellants pay into the registry of the Court the difference between the scale of charges in effect for 1934 and those prescribed by the statute here under attack. By agreement the injunction was continued and evidence comprising over 2,000 pages, with numerous exhibits, was taken before an examiner. The examiner was later appointed Special Master to decide all issues of fact and report his conclusions of law to the Court, but serious illness prevented his completing the work. On July 15, 1936, the Statutory District Court revoked its order of reference and heard the cause on the record as made up. On October 19, 1936, a majority of the Court, Circuit Judge Holmes and District Judge Barrett, filed their opinion, findings of fact and conclusions of law, deciding all material issues in favor of respondents. District Judge Deaver filed a dissenting

opinion, disagreeing with the material findings of fact and conclusions of law as found by the majority.

A final decree in accord with the majority opinion, denying a permanent injunction and dismissing the bill, was entered and filed November 27, 1936.

(d) **Cases Sustaining Jurisdiction.**

Terrace v. *Thompson*, 263 U. S. 197;
Wadley Sou. Ry. v. *Georgia*, 235 U. S. 651;
Panama Refining Co. v. *Ryan*, 293 U. S. 388;
Ex parte Young, 209 U. S. 123;
William v. *Standard Oil Co.*, 278 U. S. 235;
Tyson & Bro. v. *Banton*, 273 U. S. 419;
Compare *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178.

Respectfully submitted:

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APPENDIX "A".

AN ACT to create an act fixing a maximum charge by leaf tobacco warehouses of this state for selling and handling leaf tobacco and for other purposes.

SECTION 1. Be it enacted by the General Assembly and the same is hereby enacted by authority of the same. That beginning with the enactment and approval of this Act, that maximum charges and expenses of handling and selling leaf tobacco upon the floor of the tobacco warehouses of this state shall not exceed the following schedule, to-wit:

For auction fees fifteen cents (15) on all piles of one hundred pounds (100) or less and twenty-five cents (25) on all piles over one hundred pounds (100). For weighing and handling ten cents (10) per pile of all piles of one hundred (100) pounds and ten cents (10) for each additional one hundred pounds (100) for commissions on the gross sales of leaf tobacco in said warehouses not to exceed two and one-half per cent (2½) of said gross sales. The proprietor of each and every warehouse shall render to each seller of tobacco at his warehouse a bill plainly stating the amount charged for weighing and handling, the amounts charged for auction fees, and the amounts charged for commissions on each sale.

SECTION 2. Every proprietor or person operating a leaf tobacco warehouse in this State shall keep a correct account of all tobacco sold on the floor of his tobacco warehouse. Said account must show the correct amounts of leaf tobacco of first sale each day. The correct amounts resold each day by others upon the floor of said warehouses, and each and every proprietor or person operating a leaf tobacco warehouse in this state shall publish or cause to be published not later than thirty (30) days after close of selling season at said warehouse to be published in a newspaper of wide circulation located in the same county of the said warehouse, a correct statement showing all leaf tobacco of first sale by said warehouse, all tobacco resold by said warehouse and all tobacco resold by others upon the floor of said warehouse during selling season of the same year.

SECTION 3. Upon the passage and approval of this bill it shall be unlawful for any charges in excess of those named in this bill to be made or accepted and any proprietor or person in charge of a leaf tobacco warehouse in this state violating this act shall be guilty of a misdemeanor and punished for the same.

SECTION 4. That all laws and parts of laws in conflict with this Act be, and the same are hereby repealed.

Filed Dec. 12, 1936. Geo. F. White, Clerk.

APPENDIX "B".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA, VALDOSTA DIVISION.

IN EQUITY.

No. 88.

C. R. TOWNSEND and PARK BERNARD, a Partnership Known as Townsend & Bernard, Doing Business as Cook County Warehouse, et al.

VS.

M. J. YEOMANS, Attorney-General for the State of Georgia, et al.

By act approved March 28, 1935, the General Assembly of the State of Georgia enacted as follows:

"• • • maximum charges and expenses of handling and selling leaf tobacco upon the floor of the tobacco warehouses of this State shall not exceed the following schedule to wit:

For auction fees fifteen cents (15) on all piles of one hundred pounds (100) or less and twenty-five cents (25) on all piles over one hundred pounds (100). For weighing and handling ten cents (10) per pile on all piles of one hundred (100) pounds and ten cents (10) for each additional one hundred pounds (100) • • •"

Some forty-five tobacco warehousemen brought a complaint against a number of law enforcing officers of the State of Georgia charging that the said act was "unjust, unreasonable, arbitrary and confiscatory" and that:

> "The said schedule of maximum charges prescribed by said purported Act, if put into effect, will deprive each of your orators of his, their or its property without due process of law and will deprive him, them or it of the equal protection of the law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, upon which your orators rely."

Defendants denied that the said act was void as against the complainants for any or all of the reasons alleged. They further contended that the relief prayed for could not be granted because there were no allegations as to the invalidity of the said act, especially as to its confiscatory nature as against each individual complainant and the allegation of the complaint as to such element being confined to aggregate of the complainants as distinguished from each individual complainant.

A Court was organized under Judicial Code Sec. 266, U. S. C. A., Title 28, p. 380.

By order of January 31, 1936, after a hearing had been had for sometime by such court, J. N. Talley, Esquire, of Macon, Georgia, was appointed as special master with power, among others, as follows:

> "That he shall hear, consider, and report upon all and each issue under or which may be made in this cause under the present pleadings, or such amendments as may be offered and allowed as to the question of the rates prescribed being confiscatory as to each of the plaintiffs separately."

There have never been proffered by complainants any amendment "as to the question of the rates prescribed being confiscatory as to each of the plaintiffs separately."

After extensive hearings by said master he was stricken with a serious illness and was unable to complete his labors.

Upon such conditions being brought to the attention of such court an order was passed on July 15, 1936, embracing, among other provisions, the following:

> "The order of reference of this cause to the Honorable J. N. Talley, dated January 31, 1936, be, and it is hereby revoked.
>
> The findings of fact of the master as identified by Judge Deaver be filed with the Clerk of this Court by August 1, 1936.
>
> Said papers as filed shall not be considered as a Master's report but only as information and as an aid to the court and the attorneys.
>
> • • • • • • • • •
>
> In their briefs counsel for each side shall indicate their agreement or disagreement with any finding of fact in the report of Honorable J. N. Talley and in support of a disagreement shall cite the pages of the record sustaining their position. If any additional findings of fact are desired by either party to be made by the court, request shall be made for such findings with appropriate citations to the parts of the record sustaining them."

Equity Rule 61½, reading as follows:

> "In all references to a master, either compulsorily by the court in cases where it has the power to make a compulsory reference, or by consent of parties where consent is necessary, whether the reference be of all issues of law and fact, or only particular issues of law or fact or both, the report of the master shall be treated as presumptively correct, but shall be subject to review by the court, and the court may adopt the same, or may modify or reject the same in whole or in part when the court in the exercise of its judgment is fully satisfied that error has been committed" • • •,

does not apply.

Findings of Fact.

By virtue of the aforesaid order as well as by reason of the great ability of Mr. Talley use is made of his re-

port, so far as it had progressed, in the following manner. His findings of fact are adopted and here stated just as he has written them except as modified by notes to the findings, as follows:

1. This suit is brought by the complainants named in the bill. Three of the complainants are corporations, three are individuals doing business under trade names, and sixty-seven are members of thirty partnerships, as set out in the bill.

2. The defendants described as officers are as named in the bill and hold the official positions therein stated, to-wit: Attorney General for the State of Georgia, the Solicitors General of eight judicial circuits, the sheriffs of fifteen counties, and Solicitors of the City Courts of eleven counties, of Georgia, and five of the defendants who are named as sheriffs of their respective counties are also parties defendant as members of the class of growers of leaf tobacco and as representatives of the class of sellers of such tobacco in the warehouses described in the original bill.

3. In this proceeding the amount and value involved exceeds the sum of three thousand dollars, exclusive of interest and costs. Each of the complainants has more than three thousand dollars involved in the subject matter of this litigation.

4. Complainants are engaged in the business of handling and selling loose-leaf tobacco in the State of Georgia, and a majority of the complainants have been so engaged for several years. The number of warehouses operated and the number of warehousemen engaged in their operation both vary from year to year.

5. For many years prior to 1916 the farmers in southern Georgia largely relied upon cotton as their chief money crop. The coming of the boll weevil, however, caused them to seek in tobacco a new source of revenue. Experienced men, called "demonstrators", from the Carolinas and other tobacco growing states were engaged by the Georgia farmers to assist them in the selection of suitable soil and instruct them in the science of growing and curing tobacco. By 1925 the

industry was becoming well established and two years later the employment of demonstrators had been almost entirely abandoned. Note: The last sentence in this paragraph is modified by inserting between the words "been" and "abandoned" the words "almost entirely".

The type of tobacco grown in Georgia is the "bright leaf" and is almost exclusively used in the manufacture of cigarettes. This variety is grown extensively in North Carolina, to a much less extent in South Carolina and Georgia, and to some extent in Virginia, Kentucky and Tennessee.

From small beginnings in 1917 the cultivation of tobacco has become an important industry. The acreage planted in tobacco by the individual farmer is comparatively small, but on account of the necessity of finding adaptable soil, the aggregate acreage is now not only very considerable but widely distributed over a large area in the southern portion of the state. In 1930 the sales of tobacco through the warehouses in Georgia reached a total of 106,483,019 pounds, and the sales during the tobacco season of 1935 realized the sum of $13,582,912.71.

6. The necessity for markets and the early maturity of tobacco in Georgia presented an opportunity which was early recognized by skilled and experienced warehousemen operating in the tobacco belts of North Carolina and other states having selling seasons which begin some time after the termination of the selling season in Georgia.

With few exceptions there are and have been resident in Georgia no competent warehousemen, or skilled and experienced auctioneers, calculators, clip-men, weighers, pay-off men, and similar experienced help to assist warehousemen in handling and selling tobacco at warehouse auction sales.

In order to sell their tobacco in warehouses in Georgia, such warehouses must be operated with possibly few exceptions by warehousemen from other tobacco states and the warehousemen must employ and bring to Georgia skilled assistants from other tobacco growing states. Note: This paragraph is modified to the extent of inserting between the words "operated" and "by" in the second line thereof the words "with possibly a few exceptions".

Of the forty-five warehouses operated in 1935, thirty-nine were operated by warehousemen who also operated or were connected in some capacity with the operation of warehouses in North Carolina, Kentucky, Virginia or Tennessee. The South Carolina selling season opens about ten days later than the Georgia season. The two seasons, therefore, conflict to such extent as to prevent warehousemen and skilled help coming to Georgia from that state.

7. The principal purchasers of the bright leaf tobacco grown in Georgia and in other states are limited to a few large manufacturers of cigarettes. "The Companies" they are called by the warehousemen in their testimony. The companies purchase tobacco only at warehouse auction sales, and only at warehouses to which they send or furnish "buyers". Each "buyer" is the representative of one of the competing purchasers, a "set of buyers" usually from eight to twelve in number, is made up of representatives from each of the purchasing cigarette manufacturing companies. The presence of a "set of buyers" is essential at such auction sale. A town in which is located one or more warehouses is known as a "market". If one set of buyers is allotted it is known as a "one-set market", and if two are furnished it becomes a "two-set" market. The manufacturers by sending a set of buyers to a new warehouse may recognize a new market and by refusing to send one to an old market may cause its abandonment, and by sending either one or two sets of buyers to a given market may determine the rapidity with which the accumulated tobacco may be disposed of at auction.

Another class of purchasers is known as "speculators". On rare occasions, a speculator purchases tobacco from a grower and has it transported to a warehouse for sale. At auction sales, speculators to a comparatively limited extent, in comparison with buyers, purchase tobacco for a later sale.

8. The tobacco belt comprises approximately twenty counties in the southern portion of the state, and in 1935 contained fifteen towns known as "markets", in which were operated forty-five warehouses operated that year by com-

plainants as warehousemen. Seven of the markets were furnished one set of buyers and eight were furnished two sets. The two-set markets had a total of thirty and the one-set markets a total of fifteen warehouses in operation.

The number of warehouses operated varies from year to year. In 1931 fifty-one warehouses were operated in twenty-one markets, in 1933 forty-two were operated, and in 1934 thirty-nine. Since 1932 the number of markets has remained at fifteen.

The quantity of tobacco sold in the warehouses located in the tobacco belt and as well the price received fluctuates from year to year as will appear from the following statement of aggregate sales and average prices for the years 1930 to 1935, inclusive:

Year	Gross Sales	Value	Average Price Per Pound
1930	106,483,019 lbs.	$10,501,228.63	9.86 cents
1931	60,881,696 lbs.	3,901,841.66	6.41 cents
1932	12,171,179 lbs.	1,267,211.07	10.40 cents
1933	59,853,963 lbs.	6,764,125.31	11.30 cents
1934	33,623,475 lbs.	6,299,751.96	16.73 cents
1935	71,826,352 lbs.	13,582,912.71	18.91 cents

9. (This is finding 10 of the master, he having inadvertently omitted a finding 9.)

In the normal and customary course of marketing in Georgia tobacco can only be sold in warehouses located in the tobacco belt of that state.

10. (This is finding 11 of the master.) Beginning with the tobacco selling season of 1927, all warehousemen operating warehouses in Georgia have uniformly maintained, and exacted from sellers, a hard and fast schedule of charges for their services in handling and selling leaf tobacco. There may have been some insignificant exceptions but they were so insignificant as to be immaterial. The schedule of charges so exacted and which was in effect at the time the Georgia tobacco warehouse Act was passed in March 1928 (should be 1935), was based upon three elements, the sale value of tobacco, the number of piles handled, and the weight of the quantity sold, and was as follows:

Commissions: Two and one-half per cent (2½%).
Auction fees: Twenty-five cents per pile up to and including 200 pounds; fifty cents per pile above 200 pounds;
Weighing and handling: Twenty-five cents per pile up to 100 pounds; twenty-five cents for each additional 100 pounds.

NOTE.—The above section modified by adding immediately after the first sentence these words *in brackets:* "There may have been some insignificant exceptions but they were so insignificant as to be immaterial".

Prior to 1927 the tobacco warehousemen in Georgia for many years, if not from the beginning of the industry, had maintained and exacted from sellers of tobacco a uniform schedule of charges substantially, if not identically, the same as the schedule fixed by the Act of 1935 the validity of which is now being challenged by complainants.

11. (This is finding 13 of the master, he having apparently by inadvertence omitted a finding 12.) The Georgia tobacco warehouse Act, approved March 28, 1935, a copy of which may be found herein at page —, prescribed a schedule of maximum commissions and fees which may be lawfully charged by proprietors or persons in charge of warehouses for their services in handling and selling leaf tobacco in warehouses in the state of Georgia. The schedule so prescribed is as follows:

Commissions: Two and one-half per cent (2½%) on gross sales;
Auction fees: Fifteen cents on all piles of 100 pounds or less; twenty-five cents on all piles over 100 pounds;
Weighing and handling: Ten cents per pile of 100 pounds or less, and ten cents for each additional 100 pounds.

Under the statutory maximum schedule of charges the item of commissions, two and one-half per cent, remains

the same as in the "former charges", or those being made at the time the Act was passed. The reduction of former charges made by the Act is confined to the two items, auction fees and fees for weighing and handling. The percentage reduction is difficult of exact determination because it depends upon the number of and weight of all piles of tobacco handled.

The said Act of 1935, if enforced, will reduce the amounts received by warehousemen for their services under the former schedule of charges by approximately — per cent.

The difference in dollars between the amount the complainants would have received for their services in 1935 based upon the former or higher schedule and the amount they would be entitled to receive under the statutory or lower schedule is $115,920.90, the amount deposited in the registry.

12. (This is finding 14 of the master.) There is strenuous and expensive competition between warehousemen in securing tobacco from growers to be handled and sold in their respective warehouses, but in the sale of tobacco there is no competition except such as exists between the respective buyers and speculators at the auction sales, and the bids of the warehousemen themselves. For their services, the warehousemen throughout the tobacco belt uniformly deduct from the purchase price stated amounts according to their established schedule.

NOTE.—This finding is modified slightly only by adding immediately at the end of the first sentence and before the period the words "and the bids of the warehouseman himself."

13. (Master's finding 15.) There is substituted for this finding 15, the following: "By reason of their control of the warehouses in which tobacco is sold, in the normal and customary course of marketing in Georgia the warehousemen have, unless regulated by law, an unduly coercive control over prices charged the growers for services."

14. (The master's second number 15 finding.) After tobacco has been cured and is ready for the market the

grower grades it, as best he can, and the resulting "piles" of loose leaves are placed in sheets, which are then tied and the tobacco is so transported to the selected warehouse for sale. There the warehouseman and his employees take charge. The tobacco is unloaded, the piles dumped into flat baskets, the sheets removed, the tobacco weighed, and there is placed on the basket a ticket giving the name of the owner and the weight of the pile. The baskets of tobacco are then placed in long parallel rows along the floor of the warehouse.

Auction sales in a "market" are held daily during five days of the week, and in a particular warehouse as often as sufficient tobacco accumulates and a set of buyers go to another, but sales usually begin at nine o'clock in the morning. For the reason above stated the number of sale days at a particular warehouse during the selling season is a variable quantity.

It is essential that there be present, the warehouseman, an auctioneer, and other skilled help who are employed by the warehouseman, and one set of buyers.

As the informal procession moves along the row each basket of tobacco is offered for sale by the auctioneer and such is the rapidity of movements that sales are made at an average rate of six baskets per minute.

The warehouseman starts the auction of each basket by making the opening bid. If this is not taken or raised by another, the warehouseman becomes generally the purchaser of the tobacco for his own account. If not sold in this summary fashion, the bidding for the basket continues until its sale is announced by the auctioneer, and a card is dropped on the pile giving the name of the purchaser and the amount of his bid. The grower or other owner, however, has the right to turn down the sale and this may be accomplished by turning over the card. The grower in such case may hold his tobacco for a later sale or remove it from the warehouse. Immediately after a sale of a lot has been completed the tobacco sold is delivered to the purchaser who removes it from the floor. It is re-weighed by the purchaser, who, usually several days later, makes payment to the warehouseman, and this is based upon the re-weight of

the tobacco, less a small amount for shrinkage. As soon as the sale of a lot is completed the warehouseman pays to the seller the purchase price of the tobacco, less warehouse charges. This payment is made upon the basis of the weight of the tobacco after it reaches the warehouse and before being placed on the floor for sale. While an auction sale is in progress the warehouseman from time to time makes bids for baskets being offered. The purpose of this bidding, as well as of making the opening bid, is to boost the bidding of the buyers and speculators, in an effort to secure for the seller the best price obtainable. The tobacco so purchased as above by the warehouseman is afterwards also sold at auction, and may result in a profit or a loss to the warehouseman, and is shown in his "leaf account". References to "gross sales" in this report are to gross "first hand" sales and re-sales are not included. During the progress of auction sales a considerable quantity of tobacco leaves are left on the floor. This is known as "sweepings" or "scoop", is sold by the warehouseman and the amount received for it carried into his "leaf account" where it may reduce the loss shown by that account. The balance shown by that account appears in the warehouseman's statement of income as an added item.

NOTE.—To avoid any possible inaccuracy of statement there is inserted between the words "warehouseman" and "becomes" in the third line of this paragraph the word "generally".

15. (Master's finding 16.) The tobacco selling season in Georgia is from three to five weeks in length. The 1935 season began on the first day of August and closed on the twenty-first day of the same month.

The tobacco is ready for the market the latter part of July or early in August dependent upon the growing conditions. The exact date for opening the selling season is fixed by the manufacturers of tobacco, who are the principal buyers, and the warehousemen who operate warehouses in the tobacco belt. The exact closing date is fixed by the warehousemen and the buyers at the several markets.

The short tobacco season causes growers to rush tobacco to the market and does not afford to them a fair opportunity to properly grade, store, bundle, and orderly market their tobacco.

The short season is in large part occasioned by the efforts of the manufacturers to transfer their buyers to the North Carolina belts, in some of which the selling seasons begin early in September, and the efforts of the warehousemen to dispose of the tobacco in Georgia in order that they and their auctioneers and other skilled employees may proceed to the later and larger seasons of North Carolina and other states there to continue their warehouse businesses.

(The foregoing are all of the master's findings. The following additional findings are made.)

16. Statutes fixing the same scale of charges as proposed in the Georgia act of 1935 are the same in North Carolina and South Carolina. The scale of charges heretofore in effect in Georgia is not so high as the non statutory Tennessee or Kentucky charges. No attack has been made upon the constitutionality of the Carolina statutes.

17. The propriety of charging materially or any more for handling tobacco in Georgia than in the Carolinas is not established.

18. It is not established that the Act attacked was passed without any knowledge on the part of the legislature as to actual conditions under which the business was, and is, being carried on in Georgia.

19. It is not proven what each or any warehouseman, individual or corporate, lost in revenue by reason of the scale of charges prescribed by the act attacked. It is not denied that some warehousemen earned a satisfactory profit. It is not proven that in instances where a loss occurred such loss was not due to excessive competition, ill advised loans, unnecessary expenses in buying influence or hauling customers' tobacco, or other causes than the reduction in charges. The testimony as to the effects of the act attacked is as to the group of warehousemen who are

complainants, rather than to the effect on each one, and even then it is not proven that all the losses are traceable to the reduction in charges rather than to other causes.

20. Among the warehousemen there has been organized what is known as the Tobacco Warehousemen's Association, of which all complainants in this case are members. There is no warehousemen in the Georgia market not joined in the instant suit. The prosecution of the suit is an organized fight through the Warehousemen's Association. The growers are not eligible for membership in this Association. The Association and the buyers determine the date the market in Georgia opens and substantially determine the date on which it closes. The Association undertakes to deal with such practices as affect the interest of the members thereof and adopts regulatory rules to be observed by such members. A new member is admitted when he becomes identified with the tobacco warehouse business in Georgia and promises to be governed in his charges by the schedule of fees then in effect throughout the State of Georgia as fixed by the Association.

On page 94 of the minutes of said Association of a meeting of May 8, 1934, the following entry appears:

> "The Secretary was requested to read letter of President Brown to Mr. J. C. Lanier requesting that no reduction be made in commissions or charges by the Georgia warehousemen for the year 1934 season. After discussion of the matter it was decided that no changes should be made in charges, but that if any were made it would be higher instead of lower."

On page 91 of the minutes of the meeting of the Association of June 8, 1934, appears an entry to the effect that the object of the meeting was explained by W. E. Fenner as being

> "For the consideration of the bill passed by the Georgia legislature fixing warehouse charges, and a committee was appointed to employ attorneys."

On page 90 of the minutes of said Association of a called meeting of June 22, 1935, appears an entry as follows:

"Motion was made and carried that an additional assessment of $75.00 per warehouse be made, this to be for employment of attorneys (in this case)."

On page 89 of the minutes of said Association of a meeting of July 11, 1935, appears an entry as follows:

"On motion made and carried small warehouses assessed $85.00 and others $125.00 in making up fund for legal expenses (this case)."

On page 88 of the minutes of said Association of a meeting of July 30, 1935, appears the following:

"Upon motion duly made and carried the President was authorized to appoint at least a half dozen members of the Association to attend the Macon hearing (the interlocutory hearing in this case) and be prepared to give any testimony that might be desired by the court."

The complainants through the Warehousemen's Association and their common agreement as to the fees to be charged by them for services rendered maintain and enjoy a virtual monopoly in the field covered by their operations.

21. The business of tobacco warehousemen as conducted in Georgia in the year 1935 and for some years prior thereto was such as to cause it to be "affected with a public interest" and "clothed with a public use."

22. The scale of charges prescribed by the said Georgia Act of 1935 is not unreasonable, arbitrary and capricious and is reasonably adapted to accomplish the desired results.

23. The fixing of a scale of prices for services rendered by the warehouseman does not burden or interfere with interstate commerce.

Conclusions of Law.

1. The character of presumption in favor of legislative action and the method and conditions of attack to overcome such presumption are fully stated by the Supreme Court

of the United States in the case of Borden's Company v. Baldwin, 293 U. S. 194. It would be superfluous to repeat here. Under our findings of fact the attack has not been sustained by appeal to judicial notice or by testimony.

2. Unless "confiscation is clearly established" attack on that ground must fail. Los Angeles Gas Co. v. R. R. Com., 287 U. S. 287. There has been no such proof in this case.

3. The Supreme Court has in the recent case of Nebbia v. New York, 291 U. S. 502, presented such an able and exhaustive discussion on both sides of the question as to when an occupation is so "affected with a public interest" or "clothed with a public use" as to be subject to legislative control to the extent of price fixing that any attempt at clarification by us would be presumption. Under that decision the statute under attack is clearly within the scope of legislative power.

4. As we understand the contention of complainants it is, that because the acts of the warehousemen constitute one step in getting the tobacco to the manufacturers and such manufacturers all, or practically all, reside out of this state and it was known at the time the services were rendered by the warehousemen that the ultimate destination of the tobacco would be out of this state, that such services constituted a part of interstate commerce. We cannot agree with this contention. If sound, logically it would lead us to the conclusion that the very planting and harvesting of tobacco were parts of interstate commerce, for the reason that each of such acts was with the knowledge that all or practically all of the tobacco would ultimately move out of this state. See Chassaniol v. Greenwood, 291 U. S., 584, 587, tax on local cotton buyers.

5. Proof that the group, as an entity, was losing money is not sufficient to justify the invalidation of the Act. In order to justify the relief prayed for by the group as a whole it would be necessary to segregate the individual members thereof and ascertain whether the act was unconstitutional as to each one and that relief should be granted as to each one. Such proof has not been proffered in this case. See

Heald v. District of Columbia, 259 U. S. 114, 123, and the cases cited in the footnote.

The result is that all the prayers of the bill are denied and an appropriate decree may be presented in according with the conclusions reached.

This — day of October, 1936.

E. R. HOLMES,
United States Circuit Judge.
WM. H. BARRETT,
United States District Judge.

Filed Oct. 19, 1936.

APPENDIX "C".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE VALDOSTA DIVISION OF THE MIDDLE DISTRICT OF GEORGIA.

IN EQUITY.

Number 88.

C. R. TOWNSEND and PARK BERNARD, A Partnership Known as Townsend & Bernard, Doing Business as Cook County Warehouse, et al.,

vs.

M. J. YEOMANS, Attorney General for the State of Georgia, et al.

Two members of the three-judge court make, among others, the following findings of fact:

"The necessity for markets and the early maturity of tobacco in Georgia presented an opportunity which was early recognized by skilled and experienced warehousemen operating in the tobacco belts of North Carolina and other states having selling seasons which begin some time after the termination of the selling season in Georgia.

"With few exceptions there are and have been resident in Georgia no competent warehousemen, or skilled and experienced auctioneers, calculators, clip-men, weighers, pay-

off men, and similar experienced help to assist warehousemen in handling and selling tobacco at warehouse auction sales.

"In order to sell their tobacco in warehouses located in Georgia, such warehouses must be operated by warehousemen from other tobacco states and the warehousemen must employ and bring to Georgia skilled assistants from other tobacco growing states. * * * Note: This paragraph is modified to the extent of inserting between the words 'operated' and 'by' in the second line thereof the words 'with possibly a few exceptions'." (First part of finding of fact No. "6".)

"By reason of their control of the warehouses in which tobacco is sold, in the normal and customary course of marketing in Georgia, the warehouseman have, unless regulated by law, an unduly coercive control over prices charged the growers for services." (Finding of Fact No. "13".)

"It is not proven what each or any warehouseman, individual or corporate, lost in revenue by reason of the scale of charges prescribed by the act attacked. It is not denied that some warehousemen earned a satisfactory profit. It is not proven that in instances where a loss occurred such loss was not due to excessive competition, ill advised loans, unnecessary expenses in buying influence or hauling customers' tobacco, or other causes than the reduction in charges. The testimony as to the effects of the act attacked is as to the group of warehousemen who are complainants, rather than to the effect on each one, and even then it is not proven that all of the losses are traceable to the reduction in charges rather than to other causes." (Finding of Fact No. "19".)

"The complainants through the Warehousemen's Association and their common agreement as to the fees to be charged by them for services rendered maintain and enjoy a virtual monopoly in the field covered by their operations." (Last paragraph Finding of Fact No. "20".)

"The business of tobacco warehousemen as conducted in Georgia in the year 1935 and for some years prior thereto was such as to cause it to be 'affected with a public interest' and 'clothed with a public use'." (Finding of Fact No. "21".)

"The scale of charges prescribed by the said Georgia Act of 1935 is not unreasonable, arbitrary and capricious and is reasonably adapted to accomplish the desired results." (Finding of Fact No. "22".)

And the following conclusions of law:

"The Supreme Court has in the recent case of Nebbia v. New York, 291 U. S. 502, presented such an able and exhaustive discussion on both sides of the question as to when an occupation is so 'affected with a public interest' or 'clothed with a public use' as to be subject to legislative control to the extent of price fixing that any attempt at clarification by us would be presumption. Under that decision, the statute under attack is clearly within the scope of legislative power." (Conclusion of Law No. "3".)

"As we understand the contention of complainants, it is, that because the acts of the warthousemen constitute one step in getting the tobacco to the manufacturers and such manufacturers all, or practically all, reside out of this state and it was known at the time the services were rendered by the warehousemen that the ultimate destination of the tobacco would be out of this state, that such services constituted a part of interstate commerce. We cannot agree with this contention. If sound, logically it would lead us to the conclusion that the very planting and harvesting of tobacco were parts of interstate commerce, for the reason that each of such acts was with the knowledge that all or practically all of the tobacco would ultimately move out of this state. See Chassaniol v. Greenwood, 291 U. S. 584, 587." (Conclusion of Law No. "4".)

"Proof that the group, as an entity, was losing money is not sufficient to justify the invalidation of the Act. In order to justify the relief prayed for by the group as a whole it would be necessary to segregate the individual members thereof and ascertain whether the act was unconstitutional as to each one and that relief should be granted as to each one. Such proof has not been proffered in this case. See Heald v. District of Columbia, 259 U. S. 114, 123, and cases cited in the footnote." (Conclusion of Law No. "5".)

To these findings and conclusions, I find myself unable to agree.

Findings of fact numbers "6", "13" and "20" deal in the main with the question of monopoly.

Number "6" finds that the Georgia warehouses must be operated, with few exceptions, by warehousemen from other tobacco states, and that the warehousemen must employ and bring to Georgia skilled assistants from other tobacco states. It cannot, it seems to me, be said, as a basis for permanent legislation, that no one except those already engaged in the warehouse business in other states, has the ability to operate a warehouse. The evidence shows that some local men do either own or rent warehouses and employ experienced warehousemen to operate them. The fact that skilled assistants must be employed does not exclude any competent business man from engaging in the warehouse business.

Numbers "13" and "20" find that the warehousemen have an unduly coercive control over prices charged for their services and enjoy a virtual monopoly. For that to be true, it would be necessary for these nonresident warehousemen to possess all the business ability in that line and to have a "corner" on skilled employees, or to have such control over the tobacco companies as to prevent them from sending buyers to any warehouse not operated by the nonresident warehousemen. The evidence does not show any conspiracy between the companies and the warehousemen. Nor does it show any control by the warehousemen over skilled help necessary to be employed in warehouses. Nor does it show that these nonresident warehousemen are the only persons who have sufficient ability to rent or own a warehouse and have it properly operated. The warehouse business is a wide open field and anyone with even modest capital may enter it. It is not conceivable to me that growers in a comparatively small territory like southern Georgia, with a crop of the value of many millions of dollars could successfully contend that they are controlled and coerced by a few warehousemen, when those growers who now carry their crops to a given market could, by the outlay of an almost insignificant portion of the value of their

crops, furnish, in that same town or "market", facilities for disposing of their tobacco. It is not shown that buyers would not be sent there. And, if the warehousemen now operating are charging excessive prices for their services, in view of the expenses incident to their operation, then the growers could not only dispose of their crops through other warehousemen employed by them, but could also make money on the warehouses themselves. Instead of the warehousemen being in position to coerce the growers, the growers are in position to coerce the warehousemen to the point of extinction. There is no monopoly.

Number "21" finds that the warehouse business is "affected with a public interest." There is, I think, no monopoly, and there is, in my opinion, nothing in the evidence, in the absence of monopoly, to impress the business with a public interest.

Number "22" finds that the Act in question is not arbitrary and is reasonably adapted to accomplish the desired results. The Act is permanent and intended to operate alike each year without reference to the size of the tobacco crop in any year. The expense of operating a warehouse is not governed by and has no relation to the size of the crop. The income of the warehousemen from auction fees and weighing and handling fees is dependent upon the number and weight of piles of tobacco handled (Finding of Fact No. "11"); that is to say, upon the size of the crop. There is no provision for adjusting fees to accord with the yearly changing volume of business. (See Finding of Fact No. "8".) The act fixes no standard basis upon which a reasonable return on the money invested and the services performed in the business may be realized. A return reasonable for one year would be unreasonable for another year—either too large or too small. There is no common factor which influences both investment and return. A return which depends upon the uncertain size of the crop has no relation to or connection with reasonableness or unreasonableness. An act which does not relate investment to return but lets the former take care of itself and makes the latter depend upon an uncertain and constantly changing factor may be said to approach the arbitrary, even without strict

proof of confiscation at any given time. However, whether that fact renders the act arbitrary or not, under the Nebbia case, 291 U. S. 502, 536, if regulation is not necessary for the public good, attempted regulation is an arbitrary interference with individual liberty.

Is the act reasonably adapted to accomplish the desired result? Finding of fact number "9" is that "In the normal and customary course of marketing in Georgia, tobacco can only be sold in warehouses located in the tobacco belt of that state." A part of finding number "6" is that, "In order to sell their tobacco in warehouses located in Georgia, such warehouses must be operated, with possibly a few exceptions, by warehousemen from other tobacco states. * * *"

The purpose of the act, I take it, is to protect the growers in their income from crops. Now, if by reason of weather conditions or insects or blight, the crop in any given year should be so small that the warehousemen would decide not to come to Georgia that year, then, if the findings above stated are correct, the growers could not dispose of their crops at all, and their income for that year would be totally destroyed. Such a result would not be the desired result. Of course, the growers do not fear such a result, and the reason they do not is because they know that if all the associated nonresident warehousemen were to quit, other people or the growers themselves would build or rent warehouses and that buyers and auctioneers would be available to dispose of the crop. Growing tobacco for sale is a business, and selling tobacco by warehousemen is a business, and each, if left free, is able to take care of itself without any injury to the public or any substantial group of the public. The act is an effort, it seems to me, to limit and circumscribe one business for the benefit of another without any public necessity for doing so; and is, therefore, an arbitrary interference with individual liberty. It follows, I think, that, if the findings of fact are not correct, the act is arbitrary and, if the findings are correct, the act is not reasonably adapted to accomplish the desired end.

In the case of Lemke vs. Farmers Grain Co., 258 U. S. 50, the Supreme Court held that the buying of grain in North Dakota for shipment to other states for sale was

interstate commerce. In that case was cited the Dahnke-Walker Milling Co. case, in which the facts disclose that a Tennessee company went into Kentucky and brought wheat for shipment to the company's mill in Tennessee. The court held "that the buying, no less than the selling, of grain under such circumstances was a part of interstate commerce." On page 55 of the Lemke case, the court refers to cases in which "we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of federal control." The court then says, "Cases of that type are not in conflict with principles recognized as controlling here. None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond state lines."

Under that authority, there can scarcely be any doubt that the selling of tobacco at the Georgia warehouses for shipment to other states is a part of interstate commerce.

In the Lemke case, the court said, "Even when the particular subject remains unregulated by Congress, a State cannot lay burdens on interstate commerce in the guise of police regulations to protect the welfare of her people."

Then, in this tobacco case, the question is whether the fixing of auction fees and weighing and handling fees places any burden on interstate commerce. I do not think so. But the reason I do not think so is because, in my opinion, the plaintiff warehousemen do not enjoy a monopoly and are, therefore, not an indispensable part of the interstate business. If these nonresident warehousemen had a monopoly on the Georgia tobacco business, and, if without them, the crops could not be sold and put into interstate commerce, and, if no persons except these warehousemen, who are members of the Tobacco Warehousemen's Association, could engage in the warehouse business, and if the growers for lack of financial ability could not rent or build warehouses and employ skilled men to operate them, or if the purchasing companies were controlled by the warehousemen or were in a conspiracy with them and refused to send buyers, then, in my opinion, the warehousemen would be

so indispensably necessary to the interstate transaction as to become a part of it, if such should be the case, it would not be necessary to show that the act is confiscatory as to all the warehousemen and thus bring it within the due process clause, but any regulation under which only a few could operate at a profit would place a burden on interstate commerce.

Finding of Fact No. "19" is as follows: "It is not proven what each or any warehouseman, individual or corporate, lost in revenue by reason of the scale of charges prescribed by the act attacked. It is not denied that some warehousemen earned a satisfactory profit. It is not proven that in instances where a loss occurred such loss was not due to excessive competition, ill advised loans, unnecessary expenses in buying influence or hauling customers' tobacco, or other causes than the reduction in charges. The testimony as to the effects of the act attacked is as to the group of warehousemen who are complainants, rather than to the effect on each one, and even then it is not proven that all the losses are traceable to the reduction in charges rather than to other causes."

The "other causes" referred to in that finding would exist as well under the act as without it. In finding number "6", the warehousemen are referred to as "skilled and experienced warehousemen." They are in the business to make money. Those practices suggested in finding number "19" as possibly causing the losses must be regarded by these skilled and experienced warehousemen as helpful to the business. Those practices and the strenuous competition would increase rather than decrease under the act, because profit depends upon volume.

The court finds in number "15", that the tobacco season is short and that growers have to rush their tobacco to market. That fact will remain true under the act, making it necessary that more than a few warehouses operate in order to handle the crop in so short a time.

Therefore, if the warehouse business is a monopoly and is a part of interstate commerce, and if skilled and experienced warehousemen operate at a loss, except some who "make a satisfactory profit", then a regulation of fees

which makes it impossible for the warehouse business in general to operate at a profit, though some might make a profit, would have the effect of placing a burden on interstate commerce.

But, as before stated, the contention of the growers that there is a monopoly (which logically would cause the act to be an interference with interstate commerce) is not, in my opinion, supported by the evidence.

I agree that the act does not burden interstate commerce, but I do so because I think there is no monopoly, and for the same reason I think the warehouse business is not "affected with a public interest."

If these warehousemen did have a monopoly in the sense hereinbefore stated, the business would undoubtedly be impressed with a public interest which would authorize regulation. But when there is no monopoly and the business is open and there are no conditions, such as prohibitive cost, to prevent others from engaging in it, and when the growers have at their command complete power to compel reasonable charges or to drive out of business those who charge excessive fees, then there is no reason that I can see why such a business should be regulated to the extent of fixing the prices to be charged for services.

The Nebbia case, 291 U. S. 502, does not control this case. The court says, "affected with a public interest" means only that the business is subject to the police power and that the absence of monopoly is not controlling, if there are other reasons for regulation. But the Nebbia case makes it clear that, as a power to regulate, each case stands on its own facts, there being no monopoly in the tobacco case and there being no other reason for regulation in the public interest, the Nebbia case does not demand the upholding of the act now in question.

BASCOM S. DEAVER,
U. S. District Judge.

Filed Oct. 19, 1936.